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SUPREME COURT, U.S.

Nº. 97-2073

In The

Supreme Court of The United States

October Term, 1997

DARNELLA BARJON and LEE DURAN,
Petitioners,

v.

JOHN H. DALTON,
SECRETARY OF THE NAVY,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent, in its Question Presented, misstates the applicable standard of review. While a court's determination as to the *amount* of an attorney fee award is reviewed under the abuse of discretion standard, a determination of the reasonable *hourly rate* "is a finding of fact subsidiary to the total award" and is therefore reviewed under the clearly erroneous standard. *Turner v. Secretary of the Air Force*, 944 F.2d 804, 808 (11th Cir. 1991). *See* Petition for Writ of Certiorari ("Pet.") at 8-9.

Properly framed, the appropriate question presented is this:

Whether the court of appeals was clearly erroneous in rigidly applying the "local forum" rule in defining the "relevant legal community" to determine counsel's reasonable hourly rate.

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REPLY STATEMENT OF THE CASE

1. Respondent perpetuates the same crucial mistake made by the court of appeals when he misconstrues Petitioners' evidence as supporting a finding that "qualified attorneys were available to represent [P]etitioners" in the Sacramento legal market. (Brief for the Respondent in Opposition ("Opp. Br.") at 2.) According to Respondent, this conclusion is justified because declarant attorneys in support of Petitioners "themselves had previously represented plaintiffs who were similarly situated to [P]etitioners." (*Id.* at 3.)

But these plaintiffs were not similarly situated to Petitioners. Petitioners' difficult and costly administrative claims at the Mare Island Naval Shipyard ("MINS") in Vallejo made the *pro bono* assistance offered by nearby Oakland federal sector employment discrimination specialist Elaine Wallace a necessity. (Pet. App. D41-D42, D46-D49 & D60.) In addition, the mere fact that a couple of other attorneys had done this type of litigation *before* does not negate their support of Petitioners' contention that other lawyers with the requisite expertise were not available to undertake Petitioners' administrative actions at that time.

2. Respondent totally ignores the important point that *pro bono* counsel with Ms Wallace's expertise was simply nonexistent in the Sacramento area legal market. (Pet. at 14; Pet. App. A12, B21 & D60.)

3. A "significant portion" of the administrative proceedings (Opp. Br. at 2) did *not* take place in or near Sacramento, or even within the Eastern District. Other than Petitioners' counsel's dealings at MINS, in Vallejo,[1] almost every other significant aspect of the administrative process took place in the Oakland and San Francisco area. (Pet. at 5.)

4. The Navy's determination that an hourly rate of $200 "was a reasonable hourly rate for a Sacramento attorney similarly situated to [P]etitioners' counsel" (Opp. Br. at 2) is flatly contradicted by the EEOC's determination that an hourly rate of $250 was "reasonable" in a MINS employment discrimination complaint brought by Petitioners' counsel during a contemporaneous time period. (Pet. App. E68-E69.) The norm for administrative processing for the MINS facility was this higher rate awarded through the administrative forum in which the work was performed.

REPLY ARGUMENT FOR GRANTING THE WRIT

The decision of the court of appeals is clearly erroneous; the opinion below is at odds with the "reasonableness" considerations of this Court's Section 1988

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[1]Vallejo is geographically closer to the San Francisco-Oakland metropolitan area than to Sacramento and civilian federal employees at MINS receive locality pay at the significantly higher San Francisco Bay area rate than that of their federal counterparts in the Sacramento area. (Pet. App. D50 & D64.)

decisions and in conflict with decisions of other circuits. Review of this important federal question is warranted and necessary to ensure fairness and equitable access to justice for those battling discrimination in federal sector employment.

1. ***The "relevant legal community" for purposes of determining Petitioners' counsel's hourly rate is not limited to Sacramento, the site of the local judicial district.*** This Court's decisions in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Blum v. Stenson*, 465 U.S. 886 (1984), direct lower courts to award, where appropriate under Section 1988, reasonable attorney's fees that take into account "the relevant legal community for similar services . . . ." *Blum*, 465 U.S. at 895-96 n.11. These decisions do not impose a rigid, arbitrary prevailing hourly rate established for an entire federal judicial district.

a. Respondent wrongly argues that Petitioners carry the burden "to prove that out-of-district rates should apply." (Opp. Br. at 3.) The question presented is not whether Petitioners' counsel should receive "out-of-district rates," but whether counsel should be awarded the applicable hourly rate of the "relevant legal community" in which Petitioners litigated their administrative claims of federal employment discrimination.

In such an instance, *Hensley* and *Blum* dictate that lower courts consider the geo-political area of the legal representation and not just the arbitrary boundary lines of a federal judicial district. That is what the district court did in *Vaughns v. Board of Education of Prince George's County*,

598 F.Supp. 1262 (D. Md. 1984), when it "t[ook] into account" the hourly rates of abutting Washington D.C. even though the countywide desegregation case was pending a district court sitting in Baltimore. That is what a different panel of the Ninth Circuit did in *Gates v. Rowland*, 39 F.3d 1439 (9th Cir.), when it considered San Francisco Bay area hourly rates for litigation monitoring a Vacaville correctional facility pending in the district court in Sacramento.[2] Vacaville is actually closer to Sacramento than is the MINS facility in Vallejo.

b. The reasonableness of these holdings is confirmed by the courts' analyses in *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169 (4th Cir. 1994), *Casey v. City of Cabool*, 12 F.3d 799 (8th Cir. 1993), and *Planned Parenthood, Sioux Falls Clinic v. Miller*, 70 F.3d 517 (8th Cir. 1995), already quoted in the Petition. (Pet. 11-12 & 15-16.) Respondent's efforts to distinguish these analyses (Opp. Br. at 7-9) misses the point of *Hensley* and *Blum*, *viz.*, that, for lack of a better term, "geo-political" considerations are indeed routinely employed to define the "relevant legal community" for prevailing hourly rates and arrive at a reasonable fee award.

Although the local judicial district "may be the first place to look," *Rum Creek*, 31 F.3d at 179, and its rates may ultimately be applicable, as in *Casey*, other considerations of

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[2]Respondent failed to refute the rationale of these decisions in his opposition.

proximity and economic and political realities also are to be considered. These considerations will no more create "a second major litigation," as Respondent speculates (Opp. Br. at 6), than the typical considerations courts factor into fee awards.

The ultimate purpose of the relevant legal community standard is to prevent an opposing party from becoming liable for the risk of expensive attorney's fees not customary within the local community. The effect of the court of appeals' application of a Sacramento rate on federal employees at MINS is to impose a rate that is not the rate of that local community, irrespective of whether it is higher or lower.

c. The undisputed facts of this case refute this constricted application of the local forum rule. Vallejo is closer to Oakland than Sacramento. Vallejo is considered part of the San Francisco Bay area for pay purposes. Counsel conferred with Petitioners in Oakland and Vallejo. Counsel conferenced by phone from her office in Oakland to the Navy legal department at MINS in Vallejo. The administrative law judge who decided the Barjon complaint conducted the teleconference hearing from an office in San Francisco. The paperwork for the Duran settlement was exchanged in Petitioners' counsel's office in Oakland and another administrative law judge officed in San Francisco was notified of the settlement.

d. Petitioners do not argue for a "revision" of this Court's "relevant legal community" standard, as Respondent suggests. (Opp. Br. at 7.) Petitioners contend the court of

appeals misapplied the local forum rule when it ignored these undisputed facts in defining the "relevant legal community." This decision is clearly erroneous and is in conflict with this Court's precedent and the decisions of other circuits.

2. ***The "relevant legal community" for purposes of determining available qualified counsel is not limited to Sacramento, the community where the district court sits.*** Petitioners came to Oakland attorney Elaine Wallace to undertake their representation not only because she was geographically closer than Sacramento area attorneys, but because she charged them one dollar apiece to litigate in her field of expertise. federal employment discrimination. (Pet. App. D41-D42, D46-D48 & D58.) Legal representation tantamount to *pro bono* assistance from an expert was not available in Sacramento.

a. Respondent contends Petitioners "offered no evidence" that Oakland rates "were necessary to the enforcment of civil rights cases in Sacramento" -- that, in fact, Petitioners' evidence "pointed in the opposite direction." (Opp. Br. at 3-4.)

Again, this mischaracterizes both the nature of Petitioners' complaints and the substance of their evidence. Petitioners administrative discrimination complaints for employment practices at MINS were not run-of-the-mill civil rights cases. This is a specialized field, of which Ms Wallace is an undisputed expert, particularly with regard to MINS adminstrative actions. (Pet. App. D52-D55.)

The declarations in support of counsel's hourly rate of $250 were divided between attorneys who represent nonfederal employees, attorneys who no longer represent federal employees, and attorneys who have represented a "few" federal employees. (Pet. App. D58-D59.) Petitioners themselves knew of no qualified attorney in Sacramento. (Pet. App. D46.) This is hardly evidence of readily available qualified counsel in Sacramento. *See Rum Creek*, *supra*, 31 F.3d at 179 ("the complexity and specialized nature of a case may mean no attorney, with the required skills, is available locally").

b. Petitioners acted reasonably in locating and utilizing a federal employment law specialist in nearby Oakland, even though competent Sacramento counsel "could have handled this case, and handled it well." *Planned Parenthood, Sioux Falls Clinic v. Miller*, 70 F.3d 517, 519 (8th Cir. 1995). The court of appeals erroneously limited the relevant legal community when it ignored the realistic availability of Sacramento area counsel qualified to litigate administrative complaints at MINS in Vallejo for a dollar.

CONCLUSION

For these additional reasons, the Court should grant the petition and issue its writ of *certiorari*.

Respectfully submitted,

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